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No. 626

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

JAMES EARLIE McCLANE, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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James Everett McClane prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in the above-entitled case on June 15, 1960, and finalized on October 12, 1960, by denial of a motion for rehearing on that date.

### OPINIONS BELOW

The majority and dissenting opinions of the court below are not yet reported (*infra*, pp. 5a-13a). No opinion was rendered by the Criminal District Court of Dallas County, Texas.

## JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on June 15, 1960 (R. 259, 250, *infra*, p. 13a). A motion for rehearing was denied on October 12, 1960 (R. 280, *infra*, p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

## QUESTIONS PRESENTED

Petitioner was convicted and sentenced to five years in the penitentiary for possessing gasoline in a glass bottle with a rag screwed under the cap of the bottle. The indictment charged that he "did . . . unlawfully possess . . . a bomb, to wit, a combustible substance, to wit, gasoline contained and controlled within a container, . . . provided with a wick . . ." (R. 6). The statute under which the indictment was laid makes it a crime to possess "Any explosive, inflammable or combustible substance, controlled in any form or container . . . susceptible of being set off or exploded . . . or which will ignite. . . ." The statute exempts from its operation enumerated persons, businesses, activities, and commodities. The following questions are presented:

1. Whether, in violation of the Fourteenth Amendment, the statute places upon the accused the burden of exculpation based on proof by the prosecution of no more than naked possession of an innocuous article.

2. Whether, in violation of the Fourteenth Amendment, the statute is void for vagueness.

3. Whether, in violation of the Fourteenth Amendment, the exemptions to the statute deny equal protection by invidiously discriminating among classes which are intrinsically identical.

## STATUTE INVOLVED

Enacted in 1951, Article 1723 of the Penal Code of Texas, identified as "Offenses in connection with Bombs," is set out in full text in the appendix, *infra*, pp. 1a-5a. Texas Penal Code, Title 17, Art. 1723 (Vernon, 1953). Its immediately relevant provisions are Sections 1(a), 2, and 9. Section 1(a), one of six subsections defining the term "bomb," provides that a "bomb" is:

> Any explosive, inflammable or combustible substance, controlled in any form of container whatsoever whereby the same is susceptible of being set off or exploded, or which automatically explodes when coming in contact with heat, fire, mechanical contrivance or chemical process or which will ignite, detonate or dissemble in any manner so as to cause injury or harm to any person, animal or plant life, or which will damage property in any manner.

Section 2 makes it a crime to possess a "bomb" as defined in Section 1:

> Whoever shall manufacture, own, store, keep, sell, transport, possess or have in his control a bomb, as defined in Section 1, shall be guilty of a felony and upon conviction shall be confined in the State Penitentiary for not less than five (5) years and not more than twenty-five (25) years and fined not less than One Thousand Dollars ($1,000) and not more than Ten Thousand Dollars ($10,000), either or both. If mayhem or death shall result from such act, then the death penalty may be assessed.

Section 9 specifies the exemptions from the statute:

> The provisions of this Act shall not apply to duly constituted police or law enforcement officers,

or to members of the military, naval or air force establishments when acting within their official capacities, or to licensed and recognized manufacturers, storers or dealers in pest destroyers, chemical substances or laboratory supplies of any kind, or to licensed physicians, surgeons, chemists, pharmacists, nurses or hospital employees in their usual employment. Nor shall it apply to railroads, commercial truckers or recognized operators or licensed dealers who transport or use dynamite or other explosives in legitimate mining, oil developing, manufacturing or displaying of fireworks, or to torpedoes, fuses and other inflammable or explosive substances used by railroads as warning or signal devices, or to persons manufacturing, storing, transporting or selling ammunition where the said persons are engaged regularly in the legitimate business of dealing in such substances. Nor shall it apply to any substances or containers used or intended to be used for industrial, mechanical, laboratory or medical purposes, or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels. This Act shall exempt the following items: small arms propellant powder, and small arms primers, and percussion caps, and old fashioned black powder.

## STATEMENT

### I. When and How the Federal Constitutional Questions Were Raised

The federal constitutional questions were first raised in the Criminal District Court of Dallas County, Texas, before pleading to the indictment, by a motion to declare the statute unconstitutional (R. 8-10), and by a further plea of unconstitutionality (R. 13). Exception was taken in that court to its overruling of the motion and plea (R. 10, 13). The federal constitutional

questions were thereafter urged and rejected at each succeeding stage of the original and appellate proceedings: by a motion for a new trial (R. 40-41, 44-45, 49, 133-137, 145); on appeal (R. 212-224, 253-254); and on motion for rehearing (R. 261-262, 267-268, 272-277, 279-280).

### II. The Proceedings in the Criminal District Court of Dallas County, Texas

The indictment charged that on or about July 13, 1959, petitioner in Dallas County, Texas, "did then and there unlawfully possess and have in his control a bomb, to wit, a combustible substance, to wit, gasoline contained and controlled within a container, then and there provided with a wick, which said bomb was then and there capable by its ignition and explosion of causing damage to persons and property, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State" (R. 6).

Petitioner unsuccessfully moved to dismiss the indictment upon federal constitutional and other grounds (R. 8-10, 13-26). After the overruling of his challenge to the indictment, petitioner pleaded *nolo contendere* (R. 62-64). In accordance with Texas practice[1] a jury was impaneled and sworn to hear evidence for the purpose of assessing punishment (R. 38, 63-64). The evidence showed that in the early morning hours of July 13, 1959, petitioner and two others drove by

[1] The jury "shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty." Texas Code Crim. Proc., Title 8, Art. 693 (Vernon, 1941). "When a jury has been impaneled to assess the punishment upon a plea of 'guilty' they shall say in their verdict what the punishment is which they assess. . . ." *Id.*, Art. 701.

car to the home of one General Jackson Hill (R. 84). The car halted and petitioner stepped from it (R. 84-85). He "held a bottle filled with gasoline and with a rag screwed down with the cap . . ." (R. 85, 88-90, 104, 105, 119, 60). One of the others lit the rag with a match (R. 85, 106). Petitioner threw the bottle towards an automobile parked in the driveway of Hill's house (R. 68, 85, 106). The ensuing noise awakened the occupants of the house; the fire under and about the car was quickly extinguished with a water hose by Mrs. Hill (R. 69-71). Slight property damage occurred, consisting of a blister or pimple on the right rear tire of the car, the tire thereafter being used as a spare (R. 73-74). Petitioner had walked the picket line of a struck plant at which he was employed and he threw the bottle to frighten Hill, a nonstriker, into observing the picket line (R. 65, 69, 84, 100-101, 106-109).

Based on petitioner's plea of *nolo contendere*, the court instructed the jury "to find the defendant guilty as charged in the indictment," and upon appropriate instructions as to the range of punishment assessable for the offense, the court submitted the determination of punishment to the jury (R. 33-35). The jury returned a verdict, stating that "We . . . find the defendant guilty, as charged in the indictment, and assess his punishment at confinement in the State Penitentiary for a term of Five years" (R. 37). Judgment and sentence in accordance with the verdict followed (R. 38, 54).

### III. The Decision of the Texas Court of Criminal Appeals

On appeal the Court of Criminal Appeals of Texas by a divided vote affirmed the judgment (R. 259; *infra*, p. 5a). In its opinion the majority of the court first

held that the "exemptions separately contained in Sec. 9" of the statute "are clearly not a part of the definition of the offense and . . . it was not necessary that they be negatived in the indictment" (R. 252, *infra*, p. 8a). It nevertheless sustained the constitutionality of the statute in reliance upon the exemptions from it (R. 253-254, *infra*, pp. 8a-9a).

In dissent, Judge Davidson opined that the "statute under which this prosecution rests is void and in contravention of the Constitution of this state and of the United States" (R. 257, *infra*, p. 11a), basing his conclusion upon (1) the innocuousness of the articles whose possession without more constitutes the crime, and (2) the lack of any reasonable basis for differentiating between the classes covered by the statute and those exempt from it. (R. 257-258, *infra*, pp. 11a-13a). As to the first reason he stated in part that (R. 257, *infra*, p. 11a):

> The statute makes unlawful the mere possession of property and merchandise which is neither contraband nor so dangerous to the public health and welfare as to authorize the legislature, under its police power, to prohibit the ownership and possession thereof. The statute therefore violates and is in contravention of Art. 1, Sec. 19, of the Constitution of this state and of the Fourteenth Amendment to the Federal Constitution.
>
> The offense created by the statute is in no manner dependent upon some unlawful use or intended use of a can of gasoline. Rather, it prohibits and makes unlawful the ownership and possession of the gasoline in the container and therefore violates due process of law.

As to the second reason he stated in part that (R. 257, *infra*, p. 11a):

The statute is void and unconstitutional because the exemptions contained therein render it class legislation and therefore violative of equal protection as guaranteed by Art. 1, Sec. 3 of the Constitution of this state and the Fourteenth Amendment to the Federal Constitution.

There is an entire absence of any reasonable basis for authorizing the possession and ownership of a can of gasoline, susceptible of being exploded by all those persons, individuals, or corporations who are exempted from the statute and at the same time making it unlawful for others not so exempted to do so. The exemptions constitute the statute class legislation.

## REASONS FOR GRANTING THE WRIT

1. Petitioner was convicted and sentenced to five years in the penitentiary for possessing gasoline in a glass bottle with a rag screwed under the cap of the bottle. Possession without more constitutes the crime. As the court below stated, "The exemptions separately contained" in the statute "are clearly not a part of the definition of the offense and . . . it was not necessary that they be negatived in the indictment" (R. 252, *infra*, p. 8a). The burden of exculpation is placed on the accused. He must establish that he is within the class of persons exempt from the statute (*e.g.*, a physician or pharmacist, *supra*, p. 4), or that he is engaged in a business to which the statute does not apply (*e.g.*, a dealer in laboratory supplies, *supra*, p. 4), or that the article possessed is "used or intended to be used" for a purpose declared licit by the statute (*e.g.*, "in the arts and sciences," *supra*, p. 4).

There are clear constitutional limitations upon the validity of a statute which casts upon the accused the burden of establishing innocent possession. "Th

limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation. . . . What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. . . . For a transfer of burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance. . . ." *Morrison* v. *California*, 291 U.S. 82, 88-89, 90.[2] A "statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . . [I]t is not permissible to shift the burden by arbitrarily making one fact, which has no relevance to the guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." *Tot* v. *United States*, 319 U.S. 463, 467-468, 469. See also, *Speiser* v. *Randall*, 357 U.S. 513, 520-526.

The statute in this case cannot survive this test even viewed exclusively in terms of its present specific application. Gasoline in a glass bottle with a rag

[2] Omitted from the quotation is the alternative basis said to justify the shift, namely, "that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." 291 U.S. at 89. As this Court later made plain in *Tot* v. *United States*, 319 U.S. 463, unless it is first shown that "there be a rational connection between the facts proved and the facts presumed," a shift cannot be justified by reliance upon "comparative convenience of producing evidence of the ultimate fact." *Id.* at 467. The two "are not independent tests but . . . the first is controlling and the second but a corollary." *Ibid.*

screwed under the cap can be used as a grenade. But it is at least as likely that the reason for the rag is to give a loose cap a tight fit. And there is surely no basis in common experience for saying that the possessor of gasoline in a glass bottle with a rag under the cap is probably a bomb thrower. "Possession" of such an article therefore "is an act that carries with it not even a hint of criminality. To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of wrongdoing grows out of the naked fact of . . . [possession] as to awaken a belief that the . . . [possessor] is guilty if he fails to come forward with excuse or explanation." *Morrison* v. *California*, 291 U.S. 82, 90.

But the validity of a statute cannot be judged solely in terms of its particular application in the situation immediately before a court. "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453. And so it is appropriate to look to the larger reach of the statute.

The same statutory definition which makes a bomb of gasoline in a glass container with a rag sealed under the vessel's cap also makes a bomb of a kerosene lamp or a cigaret lighter. All three fit the description of an "explosive, inflammable or combustible substance, controlled in any form of container . . . susceptible of being set off or exploded, . . . or which will ignite . . ." (*supra*, p. 3). Indeed, respondent's expert at

the trial testified that gasoline in a glass bottle with a rag attached for use as a wick operates on "the same principle as the old kerosene lamp or lantern" (R. 90). But it is not even essential that the contrivance have a wick fitted to it to be a bomb within the meaning of the statute. Gasoline in a can or a bottle or a tank with nothing more will do as well. For it constitutes an "inflammable or combustible substance . . . controlled in any form of container . . . which automatically explodes when coming in contact with heat, fire, . . . or which will ignite . . ." (*supra*, p. 3). The carburetor of an automobile is a bomb, for controlled in it is a combustible substance capable of being set off or exploded. If a motorist runs out of gas, walks to the nearest filling station, there buys a gallon of gas placed in a glass gallon jug, and puts his handkerchief in the mouth of the jug to keep the gas from sloshing over, he is carrying a bomb when he walks back to his car with the jug of gas. So is a farmer who is lighting his way from his barn to his house carrying a kerosene lamp.

In its answer to these observations in the court below, respondent identified the precise vice of the statute. For respondent did not deny that the motorist and farmer carried a bomb within the meaning of the statute but invoked instead the exculpatory provisions of the exemptions to the statute to draw the sting. Thus it stated that (R. 234):

> From a reading of this exemption we see all of the fine examples used by appellant in his brief go completely out of the picture. The motorist carrying the gasoline in the jar was *intending* to use it for *fuel*. He was not *intending* to scare a fellow union member who had violated his "union oath" and crossed the picket line. The farmer

> carrying a kerosene lantern was *using* the *combustible substance* for *fuel* and was not igniting it and throwing it at the property of another. A carburetor is being *used* for a *mechanical* purpose. [Emphasis in original.]

The trouble with the State's explanation is that the statute places the burden upon the motorist and farmer to show licit use even though the prosecution has established nothing but naked possession of an innocuous article. Proof of *mens rea* is no part of the prosecution's case. To the extent that scienter is relevant at all, it is the accused who must show that he is innocent "of an evil-meaning mind with an evil-doing hand. . . ."[3] This totally tradnces the presumption of innocence, placing the risk of non-persuasion on the accused rather than the accuser. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome . . . . There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Speiser* v. *Randall*, 357 U. S. 513, 525-526.

[3] *Morissette* v. *United States*, 342 U. S. 246, 251.

The prosecution bears nothing when all it is required to show is possession, albeit innocent, of an article, albeit innocuous. The vice of such a procedure is compounded because it practically compels an accused to be a witness against himself. He is forced to testify in order to be sure of convincingly explaining away possession even though it is not first shown by the prosecution to be sinister. Whether or not the Fourteenth Amendment incorporates the specific prohibition of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself,"[1] constraining the testimony of an accused by placing upon him the burden of exculpation although nothing incriminatory is initially established is at war with "the very essence of a scheme of ordered liberty" and is for that reason prohibited to the states as a violation of due process. *Palko* v. *Connecticut*, 302 U.S. 319, 325; *cf. Adamson* v. *California*, 332 U.S. 46, 58.

We have thus far considered the case as if the statute's definition of a bomb were confined to Section 1(a) (*supra*, p. 3). But the succeeding five subsections (b) through (f) proliferate the definition even beyond the innocuous articles embraced in the first subsection (*infra*, pp. 1a-2a). As the court below has explained, "of the six enumerated categories set forth in the statute, some . . . are not explosives." *Roach* v. *State*, 159 Tex. Cr. R. 157, 261 S.W. 2d 847, 849. "Reliance could not, therefore, be had on the ordinary meaning of the word bomb in charging the offense defined by this statute." *Roach* v. *State*, 160 Tex. Cr. R. 347, 269 S.W. 2d 379, 380. Included

[1] *Adamson* v. *California*, 332 U.S. 46. Mr. Justice Brennan in *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 274-276

within it, but not exhausting the list, are "Any substance classified by scientists as being fissionable" (Sec. 1(b), *infra*, p. 1a); dynamite (Sec. 1(c), *infra*, p. 1a); "Any container which may conceal or segregate bacteria, . . . or contagious matter of any kind which is capable of causing sickness" (Sec. 1(d), *infra*, p. 1a); and "Any capsules, ampules, . . . or encased containers that may contain disease-spreading . . . substance of any kind or which if commingled with other substances would cause . . . any condition or situation which might endanger life, health or property" (Sec. (f), *infra*, pp. 1a-2a). And to be sure that nothing has escaped the limits of imagination the statute contains the catchall inclusion of "any other contrivance reasonably believed by the arresting officer to be intended to be used for unlawful purposes" (Sec. 1(e), *infra*, p. 1a).[3]

Nothing in the possession of fissionable material, dynamite, containers segregating bacteria, or capsules that may contain a disease-spreading substance gives the slightest warrant for inferring that the possessor entertains a criminal purpose. These may be employed in perpetrating a crime, as may almost anything else.

[3] The catchall is plainly unconstitutional. Unlike *Barsky v. Board of Regents*, 347 U.S. 442, 448, "The discretion left to enforcing officers is . . . 'one of defining the offense.' The discretion is not that of supplementing a regulation to fill in the interstices of the statute, and even if it were there are no controlling standards essential to the validity of such a delegation. The matter is simply left to each police officer, deputy sheriff, or constable in Texas 'without standard or rule, to be dealt with as he pleased.'" *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418. Law is not law which reveals its face only as the enforcing officer manifests it at the time of arrest. To understates it to say that the means thus employed to denounce conduct are "so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Lanzetta v. New Jersey*, 306 U.S. 451, 458.

but it is at least as likely that they will be put to a legitimate use. The dynamite which can blow a safe can also cut a tunnel through a mountain. There is no basis for presuming an illegal purpose. The probabilities are the other way. The statute in its entirety is thus structured to cast upon the accused the obligation of exculpation based upon the possession of articles which do not permit an adverse inference.

The short route marked by this Court to the invalidity of the statute has recently been travelled by the Court of Appeals for the District of Columbia Circuit. *Benton* v. *United States*, 232 F. 2d 341. At issue was the validity of a statute which provided that "No person shall have in his possession in the District any instrument, tool, or other implement . . . that . . . reasonably may be employed in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement." *Id.* at 342. "Inside the trunk of the [accused's] car the police found a bag containing a sledge hammer, an axe, two wrecking bars, a hacksaw with several blades, a length of knotted rope, a brace and bit." *Ibid.* The accused gave no explanation for the possession of the tools and he was convicted for having them. The conviction was reversed and the statute invalidated, the court explaining that (*id.* at 344-345):

> No rational inference of criminal intent can be drawn from the mere possession of tools which "reasonably may be employed" in crime. Such a definition encompasses a wide variety of implements, possession of which does not in itself give rise to sinister implications . . . . Though the sledge hammer, axe, and hacksaw which appellant had, quite clearly can be used criminally, they also may be, and for the most part are, used for legiti-

> mate purposes. Since the mere fact of possession of such implements has no relevance to guilt, it may not be made "the occasion of casting on the defendant the obligation of exculpation."

Precisely the same analysis is applicable here.

2. The statute is void for indefiniteness. "A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them." *Raley* v. *Ohio*, 360 U.S. 423, 438. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States* v. *Cardiff*, 344 U.S. 174, 176. A person cannot be convicted of being on the wrong side of a line if the bounds fixed by the statute are too blurred to identify an ascertainable standard of conduct. *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 221-224. And so "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391.[8]

(a) Section 1(a) of the statute defines a bomb to be:

> Any explosive, inflammable or combustible substance, controlled in any form of container whatsoever whereby the same is susceptible of being set off or exploded, or which automatically explodes when coming in contact with heat, fire, mechanical contrivance or chemical process or

[8] See also, *Winters* v. *New York*, 333 U.S. 507; *Lanzetta* v. *New Jersey*, 306 U.S. 454; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81.

> which will ignite, detonate or dissemble in any manner so as to cause injury or harm to any person, animal or plant life, or which will damage property in any manner.

This literally includes anything in a container which can explode or ignite—a box of matches, a can of gasoline, a kerosene lamp, rags in a carton kept in the attic, a cigaret lighter, a kitchen stove, an oil furnace. In its zeal not to overlook anything the statute includes everything. But a statute which includes everything gives fair warning of nothing. *Musser* v. *Utah*, 333 U.S. 95, 97.

Confusion is confounded by subsections (b) through (f) of Section 1. Subsection (a) is at least confined to what will burn or explode, a classification already unmanageable. The five succeeding subsections go beyond that. As the court below has stated, included are things which "are not explosives," so that "Reliance could not . . . be had on the ordinary meaning of the word bomb in charging the offense defined by this statute" (*supra*, p. 13). This understates it, for even limited to explosives the statute completely departs from what one might suppose to be conventionallly embraced within the word bomb.

Subsections (b) and (f) suffice to illustrate the point. Subsection (b) includes (*infra*, p. 1a):

> Any substance classified by scientists as being fissionable or capable of liberating subatomic or nuclear energy in quantities destructive of life and property.

How can a layman know what scientists classify as fissionable? And how can he know in what quantities nuclear energy can be safely liberated without being

destructive of life and property? But his mystification under subsection (b) is as nothing compared to subsection (f). The latter includes (*infra*, pp. 1a-2a):

> Any capsules, ampules, tubes, torpedoes or encased containers that may contain disease-spreading, inflammable, combustible, harmful or explosive substance of any kind or which if commingled with other substances would cause an explosion or any condition or situation which might endanger life, health or property.

A bomb is thus defined to include "Any . . . containers . . . that may contain . . . harmful . . . substance of any kind or which if commingled with other substances would cause . . . any condition or situation which might endanger life, health or property." A bomb is thus anything bad which is packaged. The definition "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against." *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89.

To be sure, the indictment was laid under subsection (a), and it is arguable that subsections (b) through (f) are severable and therefore irrelevant. Even so, standing alone subsection (a) is void for vagueness. And, even if subsections (b) through (f) are severable, subsection (a) should not be considered in isolation from them. For their unchannelled character illuminates the unrestricted reach of subsection (a). One reading subsection (a) and puzzled as to its sweep can find positive assurance from reading subsections (b) through (f) that it is meant to be as engulfing as the language denotes. And since subsection (a) includes everything in a container which can explode or ignite, it "offers no standard of conduct that it is pos-

sible to know." *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221.

(b) Ambiguity is aggravated by the exemptions to the statute. Part of the exemption reads that:

> Nor shall it apply to any substances or containers used or intended to be used for industrial, mechanical, laboratory or medical purposes, or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels.

What is a "use in the arts and sciences"? Part of the definition of "science" in a standard dictionary states that "Science is systematized knowledge. Art is knowledge made efficient by skill."[7] The imprecision of the words compels their rejection as sufficient markers of the boundary between criminal conduct and lawful behavior. The words have "'no determinative meaning'" in ordinary parlance. They "have no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole. . . ." *Winters* v. *New York*, 333 U.S. 507, 516, 519.

Other exemptions suffer from the same infirmity. What are "industrial, mechanical, laboratory or medical purposes"? What are "economic poisons"? Who are "licensed and recognized manufacturers, storers or dealers in pest destroyers, chemical substances or laboratory supplies of any kind" *Supra*, p. 4. What is the commodity which they handle?

In short, the exclusions from the statute are as vague as the inclusions. The operative scope of the statute is thus unknowable. And since scienter is no part of the crime of possession which the statute creates, the

[7] Webster's Collegiate Dictionary, 5th ed., 1937

indefiniteness of the statute is not ameliorated by a requirement of willful commission of the prohibited act. *Cf. Screws v. United States*, 325 U.S. 91, 101-107.

3. While a "state has a broad discretion in classification," the "constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary." *Smith v. Cahoon*, 283 U.S. 553, 566-567.* The invidiously discriminatory character of the present statute can be illustrated by its specific application in this case. The crime is possessing gasoline in a glass bottle with a rag screwed under the cap. The statutory presumption is that the possessor will use it as a bomb. Exempt from the statute *inter alia* are "licensed physicians, surgeons, chemists, pharmacists, nurses or hospital employees in their usual employment" (*supra*, p. 4). What is the rational basis for the differentiation? Is a physician less likely to throw a bomb than a lawyer, a chemist than a physicist, a baker employed in the kitchen of a hospital than a baker employed in the kitchen of a restaurant?

The same irrationality is evident in other of the exemptions. What is there in the character of "licensed and recognized manufacturers, storers or dealers in pest destroyers, chemical substances or laboratory supplies of any kind" (*supra*, p. 4) which differentiates them from other merchants so as to justify a presumption that the former are not prone to bomb-throwing but the latter are? What is there about "old fashioned black powder" (*supra*, p. 4) which justifies the assumption that this explosive, unlike dynamite (*infra*, p. 1a), will not be possessed by a bomb

* See also, *Skinner v. Oklahoma*, 316 U.S. 535; *Hale v. Bimco Trading Inc.*, 306 U.S. 375; *Morey v. Doud*, 354 U.S. 457.

thrower for use as a bomb? And these examples but illustrate the invidiousness of the exemptions in general (*supra*, pp. 3-4).

In relationship to the statute's presumed purpose to control bomb-throwing, the discriminations encased in this statute are thus without rational basis. They are as objectionable as the discrimination between private carriers of milk and private carriers of bread condemned in *Smith* v. *Cahoon*, 283 U.S. 553, 567, between larceny and embezzlement condemned in *Skinner* v. *Oklahoma*, 316 U.S. 535, and between foreign and domestic cement condemned in *Hale* v. *Bimco Trading, Inc.*, 306 U.S. 375, 380. When, as here, "the law lays an unequal hand on those who have committed intrinsically the same quality of offense" (*Skinner* v. *Oklahoma*, *supra* at 541), there is no basis in reason "to justify the discrimination . . . disclosed" (*Hale* v. *Bimco Trading, Inc.*, *supra*).

4. No doubt conduct of the kind disclosed by this record can constitutionally be made a crime.[9] But the

[9] It has been. Texas provides that "It shall be unlawful for any person to wilfully injure or destroy, or attempt to injure or destroy, any property belonging to another, of any kind whatsoever, without the consent of the owner and lienholder, if any, thereon." Texas Penal Code, Art. 1350.1 (Vernon 1953). Property damage less than $50 is punishable by a fine not exceeding $1,000, by imprisonment for not more than one year, or both. Higher punishment is assessable for greater property damage or bodily injury, and if "death results, the offender is guilty of murder."

Possession itself can be made a crime. Oklahoma provides that "Any person who shall manufacture, sell, transport or possess a bomb or any article containing an explosive or combustible substance, *with intent to use the same unlawfully against the person or property of another*, shall be guilty of a felony. . . ." Okla.

indictment must be laid under a valid statute—one that is nondiscriminatory, free of vagueness, and does not place upon the accused the burden of exculpation based on proof by the prosecution of nothing but naked possession of an innocuous article. Anything less takes short cuts with due process. To countenance a statute because it makes it easy to convict the guilty is to tolerate a statute which makes it easy to convict the innocent.

## CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 1961

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Stat. Anno., Title 21, § 1761.1(4) (1958, emphasis supplied). Pennsylvania provides that "Whoever possesses or carries on or about his person or in a vehicle, *with the intent to use the same unlawfully against the person or property of another*, any bomb, bombshell, or other explosive substance, except fixed ammunition, or any noxious liquid gas or substance, is guilty of a felony. . . ." Penna. Stat. Anno., Title 18, § 4417 (Purdon, 1945, emphasis supplied).

## APPENDIX A

### Texas Penal Code, Title 17, Art. 1723 (Vernon 1953)

ART. 1723. OFFENSES IN CONNECTION WITH BOMBS.

*Definition of bomb.*

Section 1. The term "bomb," as used in this Act means

(a) Any explosive, inflammable or combustible substance, controlled in any form of container whatsoever whereby the same is susceptible of being set off or exploded, or which automatically explodes when coming in contact with heat, fire, mechanical contrivance or chemical process or which will ignite, detonate or dissemble in any manner so as to cause injury or harm to any person, animal or plant life, or which will damage property in any manner.

(b) Any substance classified by scientists as being fissionable or capable of liberating subatomic or nuclear energy in quantities destructive of life and property.

(c) Any collection of nitroglycerine, dynamite, gun powder, guncotton or other form of explosive matter including caps, fuses or fuseheads capable by their ignition or explosion of causing damage to persons or property.

(d) Any container which may conceal or segregate bacteria, disease germs, poisons, poisonous gases or contagious matter of any kind that is capable of causing sickness, nausea, disability or death to any person or animal, or which may inoculate plant life, contaminate water, air or food, or damage property.

(e) Any time bomb, booby trap, land mine, dynamite stick, infernal machine or any other contrivance reasonably believed by the arresting person to be intended to be used for unlawful purposes.

(f) Any capsules, ampules, tubes, torpedoes or encased containers that may contain disease-spreading, inflammable, combustible, harmful or explosive substance of an

kind or which if commingled with other substances would cause an explosion or any condition or situation which might endanger life, health or property.

*Manufacturing, owning, storing, keeping, selling, transporting, possessing or having control*

Section 2. Whoever shall manufacture, own, store, keep, sell, transport, possess or have in his control a bomb, as defined in Section 1, shall be guilty of a felony and upon conviction shall be confined in the State Penitentiary for not less than five (5) years and not more than twenty-five (25) years and fined not less than One Thousand Dollars ($1,000) and not more than Ten Thousand Dollars ($10,000), either or both. If mayhem or death shall result from such act, then the death penalty may be assessed.

*Possession on person or in containers deposit; possession of parts*

Section 3. Whoever shall be found with a bomb on his person, or in any container carried by him or if he is shown to have just cast from him a bomb to avoid capture with it in his possession, or who is shown to have deposited the same at a place where he intended for it to be exploded or where it might have exploded and caused damage to the life, health or property of another, or who has in his possession any component part of such bomb which, if combined with any other material or contrivance, could or would be calculated to explode and damage property, life or health, shall be punished as herein set forth.

*Possession, etc., for unlawful purpose or for commission of crime*

Section 4. Whoever shall be found with such bomb on his person, or to have had the same in his possession or under his control, or to have had it before he deposited it or cast it from him to avoid capture with it in his possession, and

who is or was about to use the same for unlawful purpose or for the commitment of any crime such as burglary, murder, arson, mayhem, extortion, robbery or intimidation, or for the destruction of any house that he desires another person or persons to vacate or abstain from occupying, or for the purpose of forcing others to obey his will by threatening the use of said bomb, shall be guilty of violation as set forth in this Act.

*Contamination of water, air or food supply*

Section 5. Whoever shall contaminate the water supply, the air supply or the food supply of any person or persons, or of the public generally, by any bomb or container from which disease germs or bacteria are released or are allowed to escape for the purpose of destroying life or of injuring the health of any person, animal or plant shall be deemed guilty of violating this Act.

*Attaching so as to explode on ordinary use of thing to which attached*

Section 6. Whoever shall attach any bomb to any structure, window, doorway, automobile or other object or to any mechanism where, upon the ordinary use of the same, an explosion will result that does or may cause damage to health, life or property of another shall be guilty of a violation of this Act.

*Possession of parts with intent to combine*

Section 7. Whoever shall be shown to have brought a component part of such bomb to a certain place, or to have had same in his possession with the intent of combining it with other substance, mechanism or contrivance that will render it capable of producing an explosion, dispersion or combustion which will cause danger to life, health or property of another shall be guilty of the violation of this Act.

*Aiding, abetting or conspiring*

Section 8. Any person who is shown to have aided, abetted, conspired with, or caused another to possess, transport, deposit, store or control a bomb for the purpose of causing injury to any person or to his property, or who is shown to have given any direction to another as to where such bomb should be or was kept, used, planted, or employed, shall be deemed guilty of a violation of this Act as if the said instigator was actually present and had the said bomb in his custody and possession.

*Exemptions*

Section 9. The provisions of this Act shall not apply to duly constituted police or law enforcement officers, or to members of the military, naval or air force establishments when acting within their official capacities, or to licensed and recognized manufacturers, storers or dealers in pest destroyers, chemical substances or laboratory supplies of any kind, or to licensed physicians, surgeons, chemists, pharmacists, nurses or hospital employees in their usual employment. Nor shall it apply to railroads, commercial truckers or recognized operators or licensed dealers who transport or use dynamite or other explosives in legitimate mining, oil developing, manufacturing or displaying of fire works, or to torpedoes, fusees and other inflammable or explosive substances used by railroads as warning or signal devices, or to persons manufacturing, storing, transporting or selling ammunition where the said persons are engaged regularly in the legitimate business of dealing in such substances. Nor shall it apply to any substances or containers used or intended to be used for industrial, mechanical, laboratory or medical purposes, or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels. This Act shall exempt the following items: small arms propellant powder, and small arms primers, and percussion caps, and old fashioned black powder.

*Suppression of violations; searches*

Section 10. Whenever it comes to the knowledge of any sheriff or other peace officer of the State, or of any county or precinct, by affidavit of a reputable citizen or otherwise, that any provision of this Act is being violated or about to be violated, such officer shall immediately avail himself of all lawful means to suppress this violation; and he shall be authorized by any search warrant that is issued by virtue of this Act to enter any house, room or place to be searched, using such force as is necessary to accomplish said purpose.

*Law cumulative; partial invalidity*

Section 11. The offenses defined herein and the punishment provided are cumulative of other existing laws relating to bombs or explosives and the provisions of this Act shall not repeal any existing laws of this State so relating. Should any section or part of this Act be held invalid, it shall not affect nor invalidate any other section or part hereof. Acts 1951, 52nd Leg., p. 783, ch. 435.

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## APPENDIX B

No. 31,966

JAMES EVERETT McCLANE, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Dallas County

**Opinion**

Upon a plea of nolo contendere, appellant was convicted of the offense of unlawfully possessing a bomb and his punishment assessed by the jury at confinement in the penitentiary for 5 years.

The indictment drawn under Art. 1723, V.A.P.C., alleged that appellant did "unlawfully possess and have in his control a bomb, to-wit, a combustible substance, to-wit, gasoline contained and controlled within a container, then and there provided with a wick, which said bomb was then and there capable by its ignition and explosion of causing damage to persons and property, . . ."

Art. 1723, V.A.P.C., Sec. 1, 1(a), 2 and 9 read as follows:

> "Section 1. The term 'bomb', as used in this Act means: (a) Any explosive, inflammable or combustible substance controlled in any form of container whatsoever whereby the same is susceptible of being set off or exploded, or which automatically explodes when coming in contact with heat, fire, mechanical contrivance or chemical process or which will ignite, detonate or dissemble in any manner so as to cause injury or harm to any person, animal or plant life, or which will damage property in any manner."
>
> "Section 2. Whoever shall manufacture, own, store, keep, sell, transport, possess or have in his control a bomb, as defined in Section 1, shall be guilty of a felony and upon conviction shall be confined in the State Penitentiary for not less than five (5) years and not more than twenty-five (25) years and fined not less than One Thousand Dollars ($1,000) and not more than Ten Thousand Dollars ($10,000), either or both. If mayhem or death shall result for such act, then the death penalty may be assessed."
>
> "Section 9. The provisions of this Act shall not apply to duly constituted police or law enforcement officers, or to members of the military, naval or air force establishments when acting within their official capacities, or to licensed and recognized manufacturers, storers or dealers in pest destroyers, chemical substances or laboratory supplies of any kind, or to licensed physicians, surgeons, chemists, pharmacists, nurses or hospital employees in their usual employment. Nor shall it apply to railroads, commercial truckers or recognized operators or licensed dealers who transport or use dynamite or other explosives in

> legitimate mining, oil developing, manufacturing or displaying of fireworks, or to torpedoes, fuses and other inflammable or explosive substances used by railroads as warning or signal devices, or to persons manufacturing, storing, transporting or selling ammunition where the said persons are engaged regularly in the legitimate business of dealing in such substances. Nor shall it apply to any substances or containers used or intended to be used for industrial, mechanical laboratory or medical purposes, or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels. This Act shall exempt the following items: small arms propellent powder, and small arms primers, and percussion caps, and old fashioned black powder."

Appellant filed various motions to quash the indictment on the ground that the allegations contained therein were insufficient to charge an offense under Art. 1723, supra.

Appellant's first complaint is to the court's action in overruling motion to quash No. 4 wherein appellant alleged that the indictment was insufficient because it did not negative the exemptions contained in Sec. 9 of Art. 1723, supra. The rule governing when exceptions to the operation of a criminal statute must be negatived in the State's pleading is found in Baker v. State, 132 Tex. Cr. R. 527, 106 S.W. 2d 308, 311 as follows:

> "From what we have said above, and as far as we have been able to ascertain, our courts have uniformly held that when the Legislature sees fit to create exceptions to the general penal provisions of a statute, if such exceptions be placed in a separate section or article from the one containing the definition of the offense, or if they be not such as to be essential to the definition of the offense, it will not be necessary to negative such exceptions in the indictment charging such offense."

See also 1 Branch's Ann. P.C. 2d Ed. par. 536, p. 508, and cases there cited.

The exemptions separately contained in Sec. 9 of Art. 1723, supra, are clearly not a part of the definition of the offense and under the rule above quoted it was not necessary that they be negatived in the indictment.

Appellant next insists that the court erred in overruling his motions to quash the indictment because of certain variances between the allegations of the indictment and the language of the statute defining the offense. We find the allegations contained in the indictment sufficient to allege an offense under Sec. 1(a) of Art. 1723, supra. While in charging the offense, certain words not in the statute were substituted in the indictment such as "contained" for "controlled", "capable" for "susceptible", "ignition and explosion" for "set off or exploded" and "damage to person and property" for "injury or harm to any person, animal or plant, or damage property in any manner", the words substituted were equivalent to the words used in the statute. It is the rule where a word not in the statute is substituted in the indictment for one that is, the indictment is sufficient if the word substituted is equivalent to the word used in the statute. 1 Branch's Ann. P.C. 2d Ed. par. 515, page 496.

Appellant next insists that Art. 1723, supra, is unconstitutional.

It is first contended that the definition of a "bomb" in Sec. 1(a) is so vague and indefinite as to render the statute invalid. Appellant contends that the statute as written makes it unlawful for any citizen to possess any combustible substance which is controlled within a container and capable of being set off or exploded which would include the possession of certain items of property such as an ordinary kerosene lantern. Appellant insists that the statute as written imposes an unreasonable restriction upon the use and enjoyment of lawful property in violation of the "due process" clauses of both the State and Federal Constitutions, as was condemned by this court in the recent case of

Marney v. State, 330 S.W. 2d 623, in holding unconstitutional Sec. 3 of Art. 1436b, V.A.P.C. which purported to make unlawful the possession of mercury without a bill of sale or other evidence of title.

The definition of a bomb in Sec. 1(a) of the statute does not apply to possession of substances in a container when "used or intended to be used for industrial, mechanical, laboratory, or medical purposes or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels," under the exemptions contained in Sec. 9 of the statute. It would not be unlawful to possess an ordinary kerosene lantern when the combustible substance therein was "used or intended to be used" for fuel. So the statute, Art. 1723, supra, does not impose an unreasonable restriction upon the use and enjoyment of lawful property. Clearly it is within the police power of the legislature to provide that it shall be unlawful to possess a bomb. We hold Sec. 1(a) of the statute valid and constitutional.

We need not pass upon the appellant's attack upon the constitutionality of Sec. 1(c) of Art. 1723, supra, as it is not shown to have been violated. Hoffman v. State, .... Tex. Cr. R. ....., 20 S.W. 2d 1057, and Atwood v. State, 135 Tex. Cr. R. 543, 121 S.W. 2d 353.

Section 11 of Art. 1723, supra, provides in part as follows: "Should any section or part of this Act be held invalid, it shall not affect nor invalidate any other section or part hereof."

We overrule appellant's contention that Art. 1723, supra, was repealed by the subsequent enactment of Art. 1725, V.A.P.C., which regulates the possession and sale of fireworks. Nor do we agree with appellant that if Art. 1725, supra, did not repeal Art. 1723, supra, the two statutes denounce the same acts, provide different penalties, and therefore cannot be enforced for lack of certainty as to the punishment. Art. 1725 did not by its provisions expressly repeal Art. 1723, supra. Art. 1723, supra, relates to bombs

as defined therein while Art. 1725, supra; relates to fireworks. Art. 1723, supra, makes it unlawful *to possess a bomb* while Art. 1725, supra, makes it unlawful to *possess for sale* certain types of fireworks. The two statutes do not denounce the same acts and are not in pari materia. The enactment of Art. 1725, supra, did not by implication repeal Art. 1723, supra, and the two statutes can both stand and be enforced.

We overrule appellant's contention that the evidence is insufficient to sustain the conviction.

Upon the trial, the state introduced in evidence the appellant's extra judicial confession in which appellant admitted that on the date alleged he and his two companions possessed a bomb. The confession was sufficiently corroborated by other evidence introduced by the state. Furthermore, appellant while testifying as a witness in his own behalf admitted possessing the bomb. Appellant's extra judicial confession was sufficient to sustain his conviction without being corroborated. Fancher v. State, ... Tex. Cr. R. ....., 319 S.W. 2d 707.

Appellant's remaining contention is that because probation was granted to appellant's two accomplices the court erred in refusing to grant probation to appellant.

Whether an accused be granted benefit of the Adult Probation and Parole Law in this State is a matter resting within the sound discretion of the trial court. A convict has no authority to require such clemency. Baker v. State, 151 Tex. Cr. R. 454, 209 S.W. 2d 769, and Wilson v. State, 156 Tex. Cr. R. 228, 240 S.W. 2d 774. The record shows no abuse of discretion upon the part of the trial court in denying probation to appellant. The contention is overruled.

The judgment is affirmed.

Dice, *Judge*.

(Delivered June 15, 1960)

Opinion Approved by the Court.

**Dissenting Opinion**

The statute under which this prosecution rests is void and in contravention of the Constitution of this state and of the United States.

The statute makes unlawful the mere possession of property and merchandise which is neither contraband nor so dangerous to the public health and welfare as to authorize the legislature, under its police power, to prohibit the ownership and possession thereof. The statute therefore violates and is in contravention of Art. 1, Sec. 19, of the Constitution of this state and of the Fourteenth Amendment to the Federal Constitution.

The offense created by the statute is in no manner dependent upon some unlawful use or intended use of a can of gasoline. Rather, it prohibits and makes unlawful the ownership and possession of the gasoline in the container and therefore violates due process of law.

The statute is void and unconstitutional because the exceptions contained therein render it class legislation and therefore violative of equal protection as guaranteed by Art. 1, Sec. 3, of the Constitution of this state and the Fourteenth Amendment to the Federal Constitution.

There is an entire absence of any reasonable basis for authorizing the possession and ownership of a can of gasoline, susceptible of being exploded, by all those persons, individuals, or corporations who are exempted from the statute and at the same time making it unlawful for others not so exempted to do so. The exemptions constitute the statute class legislation.

It will be noticed that the exemptions are not limited to the possession and ownership of a can of gasoline in the conduct or operation of business or professions. The business or purpose or intent with which the can of gasoline is possessed is not material or an element of the offense.

The mere possession of the can of gasoline is lawful as to such parties but is unlawful to this applicant.

The statute is destroyed and rendered nugatory by the exemption of a can of gasoline which is used or intended to be used for industrial or mechanical purposes.

If the possession of a can of gasoline is authorized for such purposes, then what reason exists to make it unlawful for one to possess a can of gasoline for some other equally lawful and legitimate purpose? There is none. Hence the statute is void, as class legislation.

The statute is also destroyed by the exemption which takes from the provisions thereof "small arms propellent powder" and "old fashioned black powder."

There appears to be an entire absence of any reason for saying that the possession of such articles is lawful, while the possession of a can of gasoline is unlawful.

The entire statute, however, fails as a valid criminal statute by exempting "fuels" therefrom.

It is a matter of common knowledge that gasoline is a fuel, yet fuels are wholly and entirely exempted from the act. Accordingly, the construction must be given to this exemption as destroying gasoline as a substance out of which a bomb may be constructed.

Under that exemption, the can of gasoline described in the indictment could not be and was not a bomb within the definition of that term, because a bomb can not be constructed of a fuel and gasoline is a fuel.

The statute under which appellant has been convicted is null and void.

I have here limited a discussion of the question of constitutionality of the statute to general terms. At a later date I may extend my views at length, together with the citation and discussion of authorities supporting those

views. What I have here said is deemed sufficient in view of the fact that the court does not discuss the question.

I dissent.

DAVIDSON, *Judge*.

Delivered June 15, 1960.

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## APPENDIX C

### I

### [Judgment]

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

No. 31,966

APPEAL FROM DALLAS COUNTY

JAMES EVERETT McCLANE, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*.

AFFIRMED
OPINION BY JUDGE DICE
DISSENTING OPINION BY JUDGE DAVIDSON

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

II

**[Order Denying Rehearing]**

**Motion for Rehearing Overruled Without Written Opinion**
**October 12, 1960**

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that the said motion be and the same is hereby in all things overruled.